ELLARIOUS GEORGE FERNANDEZ

v.

EASTERN & ORIENTAL HOTEL [1951] SDN. BHD. & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 579 OF 1985]
6 APRIL 1987

LANDLORD AND TENANT: *Plaintiff's claim for declaration that he is lawful tenant and entitled to re-enter premises - Plaintiff acted on faith and truth of representation by 1st defendants' solicitor - Plea of fraud - Whether plaintiff left premises voluntarily or because of fraudulent inducement.*

AGENCY: *Whether principal liable for fraud of agent.*

This was a claim by the plaintiff for a declaration that he is a lawful tenant and that he is entitled to re-enter the premises and a mandatory injunction that the 2nd defendants do remove their goods and deliver possession to the plaintiff. The plaintiff contended that acting on faith and truth of representation by the 1st defendants' solicitor, he closed down his business.

Held:

[1] From the circumstances of the case and upon the evidence, the 1st defendants' solicitor did falsely promise the plaintiff that he would receive compensation for RM170,000 and in consequence of this representation, the plaintiff closed down the said premises and in the end received nothing.

[2] Following *Lloyd v. Grace, Smith Co.,* the 1st defendants are liable for the fraud of their agent.

[3] The 1st defendants are to pay damages to the plaintiff in lieu of a permanent mandatory injunction giving the plaintiff the right to reoccupy the said premises.

[4] Plaintiff awarded RM70,000 by way of compensation for the loss of protected tenancy.

[5] The 1st defendants are also to pay the plaintiff exemplary damages in the sum of RM10,000 on the ground of misrepresentation of their solicitor having induced the plaintiff to close down his business and vacated the said premises.

[Judgment for plaintiff with costs to be taxed.]

Cases referred to:
Saminathan v. Pappa [1981] 1 MLJ 121
P.J.T.V. Denson (M) Sdn. Bhd. v. Roxy (M) Sdn. Bhd. [1980] 2 MLJ 136
Lloyd v. Grace, Smith Co. [1912] AC 716
Datuk Jogindar Singh & Ors. v. Tara Rajaratnam [1986] 1 MLJ 105
Rookes v. Barnard [1964] AC 1129
Broome v. Cassell & Co. [1972] AC 1027
Drane v. Evangelou [1978] 2 All ER 437
Poh Swee Siang v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors [1988] 2 CLJ (Rep) 155

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 27, para. 446
On Equity, Snell, 2nd Edn. p. 493

For the plaintiff - Sri Ram (M/s. Sri Ram, Zulkifly & Kumar), (Navaratnam Ponompalam (M/s. Chang & Vello) and V. Sithambaram (M/s. Kumar & Co.) with him)
For the 1st defendants - Chin Yew Ming (M/s. Allan & Gledhill), (Paul Manecksha (M/s. V.P. Nathan & Partners) with him)
For the 2nd defendants - Ranjit Singh; M/s. Jag-Jit Singh & Co.
Watching Brief (for Balachandran Mahesan) - Thevintheran; M/s. Thevin Chandran Siva Wong & Jamil

JUDGMENT

Mohamed Dzaiddin J:

In this suit, the plaintiff claims against the defendants for a declaration that he is the lawful tenant of a shop, which he was carrying on the business of a hair dressing saloon ("the said premises"), in the 1st defendants' building known as the Eastern and Oriental hotel ("E & O") at No. 10 Farquhar Street, Penang; and a declaration that he is entitled to re-enter upon the said premises and re-occupy the same and by a mandatory injunction the 2nd defendants do forthwith remove their goods from the said premises and re-deliver up possession thereof to him. Further, the plaintiff claims for damages both general and special and exemplary damages for fraud, allegedly committed by Mr. Balachandran Mahesan, as solicitor acting for and on behalf of the 1st defendants. Finally, the plaintiff claims for consequential relief, interest on damages and costs.

The plaintiff's claim is ably pleaded in paras. 5, 6, 7, 8, 9 and 10 of the Re-reamended statement of claim. In the nutshell, the plaintiff alleges that sometime in the month of April 1984 the 1st defendants evinced an intention to obtain vacant possession of the said premises. They instructed Mr. Balachandran Mahesan to act on their behalf and, *inter alia*, to negotiate with the plaintiff in order to obtain vacant possession. On 28 April 1984, the said solicitor was alleged to have orally represented to the plaintiff that the 1st defendants would pay compensation in the sum of RM170,000 if the plaintiff would close down his business and deliver vacant possession of the said premises upon payment of the compensation and upon delivery of vacant possession on or before July 1984. Acting on the faith and truth of the said representation by the said solicitor, the plaintiff, on or about 30 June 1984 took steps to close down his business at the said premises, although he is still in possession of the key to the main door of the said premises.

The plaintiff contends that the representation made by the said solicitor was made falsely and fraudulently and for the purpose of only causing the plaintiff to close down his business and lock-up the said premises, so that the 1st defendants could unlawfully break into the said premises and forcibly and unlawfully took possession of the said premises. Alternatively, the plaintiff contends that the alleged oral statements or representation made by the said solicitor constitutes a collateral contract or warranty by the 1st defendants operating as a condition precedent upon the strength of which the plaintiff had acted to his detriment. As such, the refusal by the 1st defendants to pay the plaintiff compensation of RM170,000 amounted to a breach of the term of the said collateral contract or warranty so that the condition precedent to the plaintiff giving up vacant possession has failed.

The plaintiff also says that because of these promises and representations made by the said solicitor upon which a plea of fraud is pleaded, he is entitled to claim for exemplary damages.

Looking at the defence of the 1st defendants, it is quite clear to me the main thrust of the defence is that the plaintiff vacated the said premises voluntarily because business was poor. The 1st defendants say the plaintiff was in arrears of rental. He received the notice to quit

dated 27 April 1984 (AB13). In compliance with the notice to quit, he closed the said premises, removed his furniture, equipment, including his business paraphernalia, dismissed his only barber and voluntarily vacated the said premises on or about 30 June 1984. In addition, the 1st defendants deny that they or their solicitor acted fraudulently by promising to pay the plaintiff the alleged sum of RM170,000 or any sum as compensation.

In the case of the 2nd defendants, their defence is simply a denial of the allegations pleaded in the Re-reamended statement of claim and aver that they are the lawful tenant of the 1st defendants of the said premises by virtue of a tenancy agreement which they entered into with the 1st defendants on 1 November 1984 for a term of two years expiring on 31 October 1986.

In short, from the pleadings, it is clear that the substantial question for determination by this Court is simply this: Did the plaintiff leave the said premises voluntarily or was it because of the fraudulent inducement made by Mr. Balachandran Mahesan, as solicitor for the 1st defendants? If the Court finds that the plaintiff vacated voluntarily, then this is the end of the plaintiff's case.

Facts

The plaintiff had been carrying on the business of a hairdressing saloon at the said premises since 1953 in partnership with one Sabastian Joseph Fernandez. They took over the business from one Suppaian and paid him RM19,000. In March 1955 he bought over Sabastian's half share by paying him RM3,500 and in 1956 he entered into a formal agreement with the 1st defendants (FAB4) paying a rent of RM50 per month payable in advance. It is a controlled premises under the Control of Rent Act 1966. In addition to the payment of monthly rents he had also to pay for electricity and water charges. On some occasions, he paid these rentals and other charges in arrears either on the last day of the month or on the 15th day of the following month and invariably they were accepted by the 1st defendants' servant or agent. In fact, it is not disputed that on four or five occasions before 1984, he received notices of demand and notices to quit from the 1st defendants and their solicitors, but upon payment of arrears, the 1st defendants did not proceed with further action. (see: AB5, AB7, AB8, AB9 and AB10).

Then, in March 1984 the plaintiff was called by an assistant manager of the 1st defendants to his office where the latter asked the plaintiff how much he wanted as compensation in return for giving up vacant possession of the said premises. The plaintiff told the assistant manager that he wanted RM170,000 as compensation. About a month afterwards, the plaintiff received a notice to quit from the 1st defendants' solicitors, Messrs. Balachandran Mahesan & Co. dated 27 April 1984 (AB13). For the sake of clarity and in view of the importance that this letter may have in this case, I reproduce the text which reads as follows:

> Date: 27 April 1984
> Your Ref:
> Our Ref: BM/E-130/84(6)
>
> E.G.Fernandez Esq.,
> Barber Shop,
> E & O Hotel,
> Farquhar Street,
> **Penang** A.R.REGISTERED POST

Dear Sir,

Re: **Barber Shop**

We are instructed by Messrs. Eastern & Oriental Hotel (1951) Sdn. Berhad, Penang to give you Notice and to call upon you, Which We Hereby Do to vacate and deliver up vacant and peaceful possession of all that part of the Hotel premises used by you as a Barber Shop on 30 June 1984 as you are in arrears of monies due for upwards of fourteen (14) days.

We are also instructed that you have been persistently in arrears.

Failing compliance, we have firm instructions to take such steps as we may deem fit and expedient to protect our clients right without any further reference to you.

Yours faithfully,
Sgd.

c.c.
The General Manager,
E & O Hotel,
Farquhar Street,
Penang

BM/pv

After receiving this notice to quit from the 1st defendants' solicitors, a lady from the 1st defendants' office called at his shop and asked him to go and see the 1st defendants' solicitors, Mr. Balachandran Mahesan, DW3 at his office at Market Street, Penang. The meeting took place on 30 April 1984 at 4.00 p.m. According to the plaintiff, DW3 told him that his client wanted the shop back. He told DW3 he wanted RM170,000 as compensation. The plaintiff stated that DW3 promised him that he would get the 1st defendants to pay the said amount. DW3 also told him to close down his shop and to return to see him after two months. This crucial part of the plaintiff's evidence is denied by DW3. However, it is not disputed that DW3's version was noted down in his attendance slip (AB15) which reads as follows:

Fernandez/Balamahesan
30 April 1984 at 4.00 p.m.
wants RM170,000 tenant from 1954
Says he paid RM24,000 to previous tenant.
signed by,
Balamahesan.
Engaged half hour.

Relying on the assurance given by DW3, within a period of 15 days after the first meeting the plaintiff closed his shop, dismissed his barber, Ravindran (PW3), and removed some equipment and paraphernalia. On the same day, at about 4.45 p.m., DW3 telephoned Mr. Don Chan (DW1) the General Manager of the 1st defendants to inform him about his meeting with the plaintiff. The telephone conversation was followed by a letter written by DW3 to DW1 (AB14). The relevant part of the letter states:

... Mr. Fernandez has informed us that he will vacate the said premises if he is paid a sum of **RM170,000/xx** (Ringgit: One Hundred Seventy Thousand Only) the reasons he gave being diverse and we are of the view that he **will not vacate the premises without a fight."** [Emphasis is mine].

On 28 June 1984 the plaintiff went to see DW3 for the second time to enquire about the compensation which DW3 had promised him as he had already vacated the said premises. DW3 had a brief talk with the plaintiff but did not make any note. However, on the next day, he telephoned DW1 and informed him about the plaintiff's second visit. Then, on 8 August 1984, at about 10.30 a.m. the plaintiff made a third visit to DW3's office. He asked DW3 about the compensation of RM170,000 as promised. DW3 became angry and told him that he was being a nuisance and that he was not entitled to any compensation. DW3 stated that he told the plaintiff that he had conveyed the matter to his client who told him that the offer of RM170,000 was unreasonable. This final meeting was recorded in DW3's attendance slip (AB21) which reads as follows:

> Date: 8 August 1984 Time: 10.35 a.m.
>
> Mr. Fernandez came in at 10.20 wanted to know when he can get the money.
>
> I told him that there is no money due & payable to him & that he has vacated the premises & the matter is closed.
>
> He said he will see the Manager first & then a lawyer to take proceedings."

Soon after that the plaintiff consulted Messrs. R. Rajasingam & Co. who gave a formal reply to DW3's notice to quit refusing to comply with the said notice.

In the meantime, on 9 July 1984, the 1st defendants through DW1 together with Mr. Thomas Hepworth, DW2 and DW3 repossessed the said premises with the help of a locksmith. They entered the shop and found it to be in a state of utter chaos and mess. There were two or three broken chairs, the panels of the partitions had been removed, the ceiling had been broken and the wash basin smashed. DW1 took photographs showing the condition of the shop (SFABI3). Having taken over vacant possession, the 1st defendants rented the said premises to the 2nd defendants in November 1984 for a period of two years commencing on 1 November at a rental of RM1,200 per month.

On 3 November 1984 the plaintiff returned to the shop to find that the signboard fronting the main road had the name of "Avis Car Rental". On 5 November 1984, he lodged a police report No. 3032/84. Then, in April 1985 he instructed his solicitors, Messrs. Kumar & Co. who proceeded with legal action for recovery of the said premises.

After giving due consideration to the lengthy evidence, both oral and documentary, on 6 November 1986 I gave judgment for the plaintiff and came to the conclusion on the issues involved for the following reasons:

Defence of the 1st defendants

First, I find the 1st defendants have failed to prove on a balance of probability that the plaintiff left the said premises or surrendered the same voluntarily, or that he gave up vacant possession on the ground that "the business of the plaintiff was failing badly". The plaintiff, who the defendants knew would not leave without a fight, must have been convinced that he would get some compensation at whatever cost. He would not have readily surrendered up the said premises simply because the 1st defendants believed that his business was bad. It is a fact that the plaintiff still has in his possession a key to the said premises and the retention of the said key, to my mind shows an intention to return to the said premises when everything is settled between him and the 1st defendants. Surrender by operation of law can be inferred from the acts of the parties. "Delivery of possession by the tenant to the landlord and his acceptance of possession, effect a surrender by operation of law. There

is a delivery of possession sufficient to effect a surrender where the tenant returns the keys of the premises, and the landlord accepts them with the intention of changing the possession. However, the landlord's consent to the delivery of the keys is essential." *Halsbury's Laws*, 4th Edn., Vol. 27 para. 446. In the circumstances of the case, I find that there was no surrender of the said premises by operation of law. The breaking in by DW1 on 9 July 1984 in the presence of DW2 and DW3 with the help of the locksmith was not only illegal but also high-handed. Further, if what the 1st defendants said that the plaintiff had voluntarily given up the said premises I am compelled to ask myself why was not the plaintiff called or given notice that the shop was going to be opened up on the said date? Unless it was done for some ulterior motive, there was no reason for the 1st defendants or their solicitor, DW3, not informing the plaintiff or his solicitor of this opening up of the said premises.

Secondly, I find no substance in the 1st defendants' contention that the plaintiff closed down his business and removed the furniture and equipment in compliance with the notice to quit dated 27 April 1984 (AB13). From the evidence, I find the plaintiff was not a stranger to the 1st defendants' notices to quit. Quite often whenever he was in arrears of rental and other dues he received the notices to quit reminding him to settle the arrears and it appeared that when these arrears were paid they were accepted by the 1st defendants' employees. In the circumstances of this case, I form an opinion that this notice to quit (AB13) was just a device thought of by DW1 to try to get the plaintiff to agree to some form of compensation in the event he agreed to give up vacant possession. Even the notice, AB13, does not show which month was the plaintiff in arrear. In fact, it was shown in evidence that the plaintiff was never in arrears of rental for March 1984.

Thirdly, on the question of poor business, I am satisfied from the evidence of the defendants' witnesses that the 1st defendants failed to prove that business was really that bad which they said had led the plaintiff to close down his shop, dismissed the only barber, PW3, and removed his equipment and chairs. The impression of one or two witnesses when they passed by and saw no customers inside or that at times the plaintiff or PW3 was seen seated outside the shop is not sufficient proof that business was bad. On the contrary, from the evidence of the plaintiff, who was never challenged when he stated that he was getting a net average income RM400 per month, I am satisfied that at that point of time he still maintained a good business.

For the above reasons, I find the 1st defendants failed to establish on a balance of probability that the plaintiff vacated and surrendered the said premises voluntarily on their contention that his business was failing or in consequence of the notice to quit dated 27 April 1984 (AB13).

A case of fraudulent misrepresentation by DW3

It is the plaintiff's case that he closed down his business and vacated the said premises because Mr. Balachandran Mahesan, DW3, acting on behalf of the 1st defendants fraudulently represented to him on 28 April 1984 that the 1st defendants would pay him compensation of RM170,000. There are eleven "Particulars of Fraud" pleaded by the plaintiff in para. 9 of the re-reamended statement of claim and the gist is that Mr. Balachandran Mahesan falsely promised him that he would receive the said sum of RM17,000 and in consequence of this representation the plaintiff closed down the said premises and thereby suffered grave loss.

It is trite law that the onus of proof of fraud in Malaysia is proof beyond reasonable doubt. [*Saminathan v. Pappa* [1981] 1 MLJ 121]. Snell on *Equity* (2nd Edn.,) p. 493 defines fraudulent misrepresentation as "a false statement of fact made knowingly by the representor or without belief in its truth or recklessly without caring whether it is true or false, with intent that it should be acted upon and which is in fact acted upon by the representee." Raja Azlan Shah CJ (Malaya) (as he then was) stated on *P.J.T.V. Denson (M) Sdn. Bhd. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136 @ 138 that "whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud." Therefore, the issue in this present case is whether or not Mr. Balachandran Mahesan, DW3, had made a statement to the plaintiff which amounted to a representation that the plaintiff would get his compensation of RM170,000 if he were to close down his business and give up vacant possession of the said premises and in consequence of such promise the plaintiff acted upon it to his detriment.

The evidence of the plaintiff to prove fraudulent misrepresentation is as follows. According to the plaintiff, when he met DW3 in the latter's office on the first occasion on 30 April 1984, DW3 told him that the 1st defendants wanted the premises back. He replied that he was prepared to vacate the premises if the 1st defendants would pay him RM170,000. DW3 then assured him that he would get the 1st defendants to pay the said amount. However, DW3 asked him why he wanted so much and he replied stating that he had been carrying on business in the said premises since 1953 and that he and his partner had paid RM19,000 for the business. Under cross-examination, the plaintiff stated that he paid RM24,000 and added that the other reason was that he wanted the money to send his son to the United Kingdom to study law. According to the plaintiff, DW3 then asked him to return to his shop to close it down and later to see him in the office after two months. On or about 15 days thereafter, the plaintiff closed his shop, dismissed his barber PW3 and removed his equipment.

It is worthy to note that there is a marked conflict of evidence between the plaintiff and DW3 regarding what transpired between them on 30 April 1984. The version of DW3 was that the plaintiff called to see him regarding his letter, AB13. He told the plaintiff that he had nothing to talk about except what was stated in the notice was final. However, the plaintiff insisted on talking to him and he obliged. During the discussion the plaintiff asked him if E & O could pay him compensation if he were to vacate the premises. He told the plaintiff "in no uncertain term" that his only instruction was to ask him to quit. When the plaintiff mentioned a figure of RM170,000 as compensation, his reaction was one of shock at the figure as well as being amused at the plaintiff's request for compensation. He jotted down in his attendance slip about this meeting. (AB15.) It is also worth remembering that according to the plaintiff, he met DW3 alone, whereas DW3 stated that the discussion was held in the office of Miss Shyama, DW4. It is also significant to bear in mind that under cross-examination, the following suggestions were put to the plaintiff by Counsel for the 1st defendants regarding the first meeting:

1. Q: What subsequently transpired took place in Miss Shyama's room in her presence.

   A: Not true. It is also not true that I asked Mr. Bala if E & O would give me anything. He did not tell me that his job was to get me out of the premises.

2. Q: Mr. Bala asked you what grounds you wanted compensation.

   A: I agree that he asked for my grounds. I also agree that I told him I wanted RM170,000. He also asked me how I arrived at this figure. I gave my reasons i.e. about RM22,500 and education of my son to UK.

3. Q: Mr. Bala then told you, you were silly and unreasonable.

A: Not true.

4. Q: You told Mr. Bala: "You just ask them for RM170,000 and see what they say."

A: I deny.

5. Q: Mr. Bala then told you: "You are very silly. Anyway, I will convey what you want."

A: Also not true. I agree I left his office.

In my opinion, questions 4 and 5 above are material and crucial when I come to assess the credibility of DW3. One would have thought the idea of putting questions to a witness by Counsel in a cross-examination is to challenge that part of the witness's evidence which runs contrary to client's instruction to Counsel. Yet, in Mr. Chin's examination of DW3 about the first visit, no evidence was adduced regarding the alleged statements as suggested in 4 and 5 above. Indeed, when Mr. Sri Ram, in cross-examination suggested that his evidence regarding what had transpired on the first meeting with the plaintiff was substantially different from his Counsel's questions put to the plaintiff, DW3 merely disagreed with this suggestion.

The second meeting between the plaintiff and DW3 took place about two months after the first encounter. According to the plaintiff, he returned to see DW3 in his office on 28 June 1984 to inform him that he had closed down his shop and had taken away some of his belongings. However, he was told by DW3 to see him again after two months. Admittedly, there was no evidence to the effect that on this second occasion the plaintiff did specifically ask DW3 about the compensation of RM170,000. It is reasonable, in the circumstances, to infer that he came to see DW3 to find out about the compensation in as much as he wanted to inform DW3 that he had vacated the premises in compliance with the promise made during the first visit. The version given by DW3 to find out about the compensation with the promise made during the first visit. The version given by DW3 in his evidence was again at variance. He stated that when the plaintiff came to see him he was in a hurry for an appointment. He asked him the purpose of his visit. The plaintiff told him that he had taken his belongings and would be vacating the shop. He stated that the plaintiff promised to hand over the key of the premises to the receptionist at the E & O Hotel on 30 June 1984. He did not make any note about this meeting, but informed his client DW1 by phone on 29 June 1984.

On 8 August 1984 the plaintiff visited DW3 for the third occasion. He asked DW3 about the sum of RM170,000 which the latter promised him. According to the plaintiff, DW3 became very angry and shouted at him saying "you are not entitled to any compensation". The plaintiff replied by telling him that he would see him in Court. Under cross-examination, the plaintiff agreed that DW3 told him that he had conveyed to the 1st defendants about the compensation of RM170,000 which they subsequently instructed DW3 to inform him that the said offer was unreasonable. DW3 in his evidence stated that this meeting was cordial. He was surprised to see the plaintiff because he did not expect to see him for the third time. However, he explained to the plaintiff that he had conveyed the plaintiff's request to the 1st defendants who replied saying that the offer was unreasonable. He had also instructions to proceed legal action against the plaintiff. He showed the plaintiff the 1st defendants' letter dated 2 May 1984 (AB16). The third meeting was recorded in his attendance slip (AB21).

At this stage, I should comment about the presence of Miss Shyama, DW4, during the first meeting on 30 April 1984. According to the plaintiff, he was DW4 in DW3's office on his third visit on 8 August 1984. He did not see her on the first visit. It is apparent from DW4's

evidence that DW3 introduced her into the scene with the sole purpose of getting her to corroborate his evidence regarding what had transpired during the crucial first meeting. In her evidence, DW4 stated that she was in Butterworth Court in the morning and returned to office at 11.30 a.m. DW4 claimed DW3 brought the plaintiff into her chambers on 30 April 1984 at about 4.00 p.m. Her recollection of what had taken place was quite vivid, in the sense that she knew why the plaintiff came to see DW3 and that she was able to recount the conversation between the plaintiff and DW3, despite her confession, under cross-examination, that she was indifferent to the plaintiff and did not participate in the discussion. On the whole, I find flaws in DW4's evidence. According to her when both the plaintiff and DW3 set opposite her the plaintiff had in his hand the notice to quit. He asked DW3 whether E & O had any compensation for him and asked if DW3 had any offer to make on behalf of E & O. Compare this piece of evidence with DW3's own evidence. He stated that when they were seated opposite DW4, the plaintiff asked him why E & O wanted him to leave. He told him that he was in arrears of rent. The plaintiff then asked him if E & O would pay compensation. For a person who was indifferent and who did not take part in the discussion, I find it more surprising when she stated in evidence that her reaction, upon the mention of the figure of RM170,000, was one of surprise. One is tempted to ask if her evidence is meant to corroborate DW3's evidence who also stated that he was shocked at the figure and amused at the plaintiff's request for compensation. Again, it is quite surprising for DW3 to have omitted to mention in his attendance slip (AB15) about DW4 being present during the discussion. I am sure the attendance slip is a crucial piece of evidence to DW3. Be that as it may and considering her evidence as a whole, I do not believe that she was present in the office during the first meeting on 30 April 1984. On the other hand, I accept the evidence of the plaintiff that he only saw DW4 on the third visit to DW3's office.

With regard to the three meetings between the plaintiff and DW3 in the latter's office, in the first place, one wonders why it was necessary to record the conversation on the first meeting in DW3's attendance slip (AB15) when he himself had stated that he told the plaintiff he had nothing to discuss except to inform him the notice to quit was final. Again, why was it necessary to note down the amount of RM170,000, in AB15 after he had told the plaintiff "in no uncertain term" that his instruction was to get the plaintiff out of the premises. From the above, I can safely infer that this was a crucial meeting where payment of compensation in return for the premises to DW3's client was discussed and a promise to pay RM170,000 was made by DW3. My conclusion is fortified by DW3's letter to his client, DW1 (AB14) which is contemporaneous with the attendance slip, where in the said letter DW3 had warned DW1 ("that he will not vacate the premises without a fight") about the plaintiff's insistence for compensation.

As for the second meeting, I do not think the plaintiff would have visited DW3 simply to report that he had removed his belongings from the said premises. The inference must be more than that. In the first place, he must have visited DW3 in response to the latter's request during the first visit. Secondly, he must have gone there to inform DW3 not only that he had closed down his shop but more important to find out about the compensation which was promised. Again, if it was just a casual visit why was it necessary for DW3 to telephone DW1 and informed the latter about the plaintiff's visit.

Finally, I find that the third meeting on 8 August 1984 was a follow-up of the previous visit, where he wanted to know when he could get the compensation, but to his surprise and horror, DW3 told him for the first time that the sum of RM170,000 was not reasonable. This is confirmed by DW3's note (AB21). But, why was it necessary for DW3 to have told the plaintiff only on the third visit that the amount of RM170,000 was unreasonable when in his

own evidence, he had already informed the plaintiff during the first meeting he had nothing to discuss and that his instruction was to get the plaintiff out of the premises. Clearly, the attendance slips would not be necessary if I were to accept DW3's evidence about what had transpired on the first meeting. Obviously, the two attendance slips, telephone conversations and letters between him and DW1 have cast grave doubts in my mind on DW3's version about the three meetings.

At this stage, I should comment on DW3's evidence. It is quite natural for the general manager of the E & O hotel to stand firm in his evidence and tell the Court what actually had happened between his company and the plaintiff. Considering his evidence regarding compensation, I must say that I am appalled to note his complete denial that he ever instructed DW3 to negotiate for any offer of compensation to the plaintiff. Yet, under cross-examination by Mr. Sri Ram, Mr. Chan agreed that from the tenor of his letter to DW3 (AB16) the 1st defendants was prepared to pay compensation to the plaintiff but not a sum of RM170,000.

Therefore, in deciding whether or not the plaintiff has proved his case beyond reasonable doubt, it is necessary for this Court not only to decide between the evidence to the plaintiff and that of DW3, but also circumstances tending to show that there was a representation made by DW3 which was acted upon by the plaintiff. I have no reason to doubt the plaintiff's evidence. He gave his evidence in a straightforward manner, but at times excitable. However, he was never evasive, although on a few occasions he was hesitant in his answers because he admitted, sometime "my brain fails me". He is a man of 70 years old and he said that he had to wait for a while to think to get "normal". No doubt there were some discrepancies between his evidence in Court and his deposition in the affidavit. But, taken as a whole, they were not so serious as amounting to my rejecting his entire evidence. Above all, the plaintiff impressed me as a truthful witness.

On the other hand, in estimating what weight to be attached to DW3's evidence, regard must be had to all the circumstances of the case from which an inference can be reasonably drawn as to the accuracy or otherwise of his evidence and in particular, to the question whether or not he had any motive to conceal or misrepresent the facts. Therefore, bearing in mind his professional position and the fact that this is a gentleman holding a better position in life than the plaintiff, after having weighted his evidence and testing it against the whole evidence in the case, I am satisfied that DW3 was not telling the truth on the issue of the representation or promise which he made to the plaintiff for the payment of compensation which had induced the plaintiff to give up vacant possession of the said premises. With regard to the three meetings, some pertinent questions may be asked, whose answers will undoubtedly throw grave doubts in DW3's evidence. Indeed, they have convinced me that DW3 was not speaking the truth. In the first place, why should the plaintiff return to DW3's office for the second and third occasions had it not been for a promise that he would get his compensation. No reasonable person like the plaintiff would vacate the said premises when he knows all along that he is a "protected tenant" and when he had already made it known to DW3 that he would not "leave without a fight", unless his giving up possession of the premises was induced by DW3 that he would get his compensation.

Another instance why I disbelieve DW3 relates to an explanation he gave to Mr. Kumaraendran (PW2), a fellow solicitor sometime in December 1984 about the plaintiff vacating the said premises. According to PW2, he was told by DW3 that the plaintiff had voluntarily vacated by signing a document to that effect. When asked to send a copy of the said document, DW3 never sent any. Here, I have no reason to disbelieve PW2.

Thus, from the circumstances of the case and upon the evidence before me, it is my inevitable conclusion that DW3 did falsely promise the plaintiff that he would receive compensation for RM170,000 and in consequence of this representation, the plaintiff closed down the said premises and in the end received nothing.

It follows, therefore, the 1st defendants are liable for the fraud of his agent, DW3, who was acting within the scope of his authority (*Lloyd v. Grace, Smith Co.* [1912] AC 716). Based on the conclusions which I have reached in this suit, I gave judgment for the plaintiff on the following terms:

(1) The 1st defendants to pay damages to the plaintiff in lieu of a permanent mandatory injunction giving the plaintiff the right to reoccupy the said premises. Considering the present condition and the existing tenancy agreement and occupation of the said premises by the 2nd defendants and bearing in mind that the plaintiff had removed all his equipment and other paraphernalia since 1984, I do not think specific relief is the appropriate remedy. In my opinion, damages which should be compensatory should represent the loss of the protected tenancy of the said premises, which included physical inconvenience. It has been said that the object of damages for any torts committed by one party is to put the injured party into as good a position financially as he would have been in if the tort had not been committed. [*Datuk Jogindar Singh & Ors. v. Tara Rajaratnam* [1986] 1 MLJ 105 @ 113].

In assessing the amount of damages, I take into consideration the following factors and circumstances. The plaintiff was a controlled tenant within the Control of Rent Act 1966 and that in 1953 he paid a quite substantial sum to become the sole owner of barber shop. The location of his business within the 1st defendant's well-known hotel and his deprivation thereof in term of business goodwill means a great deal to the plaintiff. His loss and the 1st defendants' gain has benefitted the latter enormously by re-letting the said premises to the 2nd defendants. On the other hand, I have to disregard the plaintiff's magical figure of RM170,000 for reason that it is extremely on the higher side of the scale. However, to be fair and just, the amount of compensation should reflect the amount for the loss of earning by reason that the plaintiff had been put out of business since April 1984, which he claimed to be at an average of RM400 per month. Therefore, having regard to the factors mentioned above, I awarded the plaintiff by way of compensation for the loss of protected tenancy, a sum of RM70,000.

(2) The 1st defendants will also pay the plaintiff exemplary damages on the ground of mis-representation of DW3 having induced the plaintiff to close down his business and vacated the said premises. On this question of exemplary damages, the authorities are clear in that damages are recoverable only if the circumstances of the case bring it within one of the three categories set out by Lord Devlin *in Rookes v. Barnad* [1964] AC 1129 which has since been approved in *Broome v. Cassell & Co.* [1972] AC 1027. The present case seems to come within the second category where the conduct of the 1st defendants is calculated to make a profit for himself which may exceed the compensation payable to the plaintiff. In the words of Lord Devlin:

> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets which he either could not obtain at all or not obtain at a price greater than he wants to put down.

According to Lord Denning in *Drane v. Evangelou* [1978] 2 All ER 437 this category includes cases of unlawful eviction of a tenant. In fact, in that case, the English Court of Appeal upheld the County Court's decision in awarding exemplary damages for £1,000 on the ground that the defendant's conduct in unlawfully evicting the plaintiff in the manner in which he did was a grave wrong. The defendant had acted with a cynical disregard of the plaintiff's rights in seeking to gain, at the expense of the plaintiff, property which he coveted and which he could not otherwise obtain from the plaintiff who was protected by the Rent Acts.

In *Poh Swee Siang v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors.* (Penang High Court Civil Suit No. 17 of 1984) [1988] 2 CLJ (Rep) 155 Ajaib Singh J awarded the plaintiff RM150,000 as exemplary damages for trespass by the defendants whose servants or agents wrongfully and illegally entered the plaintiff's vegetable land and bull-dozed the said land together with some structures belonging to the plaintiff.

To my mind, from the evidence, the circumstances in which the plaintiff was induced and forced out of the said premises to enable the 1st defendants to gain by letting the said premises to the 2nd defendants deserved to be deprecated. In the words of Lord Devlin in *Rookes v. Barnard*, exemplary damages can properly be awarded whenever it is necessary to teach the wrongdoer that tort does not pay. In my judgment, a sum of RM10,000 would be a fair and reasonable amount.

In the circumstances of the whole case, I entered judgment for the plaintiff in the sum of RM70,000 as general damages for loss of protected tenancy and RM10,000 for exemplary damage making a total of RM80,000. The plaintiff would also be entitled to interest on RM70,000 at the rate of 8 percent per annum from 1 November 1984, and costs of the entire proceedings, to be taxed by the proper officer of the Court.

Also found at [1987] 2 CLJ 145